

in the lumber industry generally which decides its character rather than the recognition such sales occupies in any branch of that industry.

#### § 779.324 Recognition “in.”

The express terms of the statutory provision requires the “recognition” to be “in” the industry and not “by” the industry. Thus, the basis for the determination as to what is recognized as retail “in the particular industry” is wider and greater than the views of an employer in a trade or business, or an association of such employers. It is clear from the legislative history and judicial pronouncements that it was not the intent of this provision to delegate to employers in any particular industry the power to exempt themselves from the requirements of the Act. It was emphasized in the debates in Congress that while the views of an industry are significant and material in determining what is recognized as a retail sale in a particular industry, the determination is not dependent on those views alone. (See 95 Cong. Rec. pp. 12501, 12502, and 12510; *Wirtz v. Steepleton General Tire Co.*, 383 U.S. 190; *Mitchell v. City Ice Co.*, 273 F. 2d 560 (CA-5); *Durkin v. Casa Baldrich, Inc.*, 111 F. Supp. 71 (DCPR) affirmed 214 F. 2d 703 (CA-1); see also *Aetna Finance Co. v. Mitchell*, 247 F. 2d 190 (CA-1).) Such a determination must take into consideration the well-settled habits of business, traditional understanding and common knowledge. These involve the understanding and knowledge of the purchaser as well as the seller, the wholesaler as well as the retailer, the employee as well as the employer, and private and governmental research and statistical organizations. The understanding of all these and others who have knowledge of recognized classifications in an industry, would all be relevant in the determination of the question.

#### § 779.325 Functions of the Secretary and the courts.

It may be necessary for the Secretary in the performance of his duties under the Act, to determine in some instances whether a sale or service is recognized as a retail sale or particular industry. In the exceptional case where

the determination cannot be made on the basis of common knowledge or readily accessible information, the Secretary may gather the information needed for the purpose of making such determinations. Available information on usage and practice in the industry is carefully considered in making such determinations, but the “word-usage of the industry” does not have controlling force; the Secretary “cannot be hamstrung by the terminology of a particular trade” and possesses considerable discretion as the one responsible for the actual administration of the Act. (*Wirtz v. Steepleton General Tire Co.*, 383 U.S. 190; and see 95 Cong. Rec. 12501-12502, 12510.) The responsibility for making final decisions, of course, rests with the courts. An employer disagreeing with the determinations of the Secretary and claiming exemption has the burden of proving in a court proceeding that the prescribed percentage of the establishment's sales or services are recognized as retail in the industry and that his establishment qualifies for the exemption claimed by him. (See *Wirtz v. Steepleton*, cited above, and 95 Cong. Rec. 12510.)

#### § 779.326 Sources of information.

In determining whether a sale or service is recognized as a retail sale or service in a particular industry, there are available to the Secretary a number of sources of information to aid him in arriving at a conclusion. These sources include: (a) The legislative history of the Act as originally enacted in 1938 and the legislative history of the 1949, 1961, and 1966 amendments to the Act pertaining to those sections in which the term “retail or service establishment” is found, particularly in the section 13(a)(2) exemption; (b) the decisions of the courts during the intervening years; and (c) the Secretary's experience in the intervening years in interpreting and administering the Act. These sources of information enable the Secretary to lay down certain standards and criteria, as discussed in this subpart, for determining generally and in some cases specifically what sales or services are recognized as retail sales or services in particular industries.